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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 55

CESARO SGRO, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MAY 6, 1932

CERTIORARI GRANTED MAY 31, 1932

(36,734)

(36,734)

SUPREME COURT OF THE UNITED STATES

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[fols. a & 1]

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

No. —

CESARO SGRO, Plaintiff in Error,

against

UNITED STATES OF AMERICA, Defendant in Error

NOTICE THAT PRÆCIPE HAS BEEN FILED

To the Hon. Oliver D. Burden, attorney for defendant in error.

SIR: Please take notice that on the 5th day of February, 1927, the undersigned filed with the Clerk of the Court a præcipe for the record to be transmitted to the United States Circuit Court of Appeals, Second Circuit, on the Writ of Error sued out in the above cause, and notice of which præcipe is herewith served on you.

Dated this 5th day of February, 1927.

I. K. Baxter, Attorney for Plaintiff in Error. Office and Postoffice address: 66 Genesee Street, Utica, N. Y.

[fol. 2] UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

NOTICE THAT BILL OF EXCEPTIONS WILL BE PRESENTED

To the Hon. Oliver D. Burden, attorney for defendant in error.

SIR: You will please take notice that the annexed Bill of Exceptions herein will be presented to the Honorable Frank Cooper, United States District Court Judge, in and for the Northern District of New York, at the Court House, in the City of Albany, N. Y., on the 14th day of February, 1927, at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for settlement and al-

lowance as a part of the record in the above entitled cause, [fol. 3] upon the Writ of Error sued out herein by the Plaintiff-in-Error.

Dated February 10th, 1927.

I. K. Baxter, Attorney for Plaintiff in Error. Office and Postoffice address: 66 Genesee Street, Utica, N. Y.

In District Court of the United States for the Northern District of New York, at the Utica Term, in the Year 1926

Information

First Count

Be it remembered that Oliver D. Burden, Attorney of the United States for the Northern District of New York, who for the United States in this behalf prosecutes, in his own person comes here into the District Court of the United States for said District and division, on this 6th day of December, in this same term, leave of court first being had and obtained, and for the United States gives the court here to understand and be informed, that as shown by the sworn affidavit of Charles Dodd hereto annexed, Cesaro Sgro, Bouckville, N. Y., on August 2, 1926, at Bouckville Hotel, Bouckville, N. Y., aforesaid, in said district and division, as a first offense of that kind on his part unlawfully did possess a large quantity, to wit, 3½ bbl. beer, 1 [fol. 4] pt. gin, of intoxicating liquor, to wit, as otherwise than as authorized in the National Prohibition Act, that is to say for intoxicating beverage purposes; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

Second Count

And said Attorney of the United States, who prosecutes as aforesaid, for the United States further gives the court here to understand and be informed, that said Cesaro Sgro on June 29, 1926, at Bouckville Hotel, Bouckville, N. Y., aforesaid in said district and division, as a first offense

of that kind on his part, unlawfully did knowingly sell, to Agent Dodd for intoxicating beverage purposes, certain intoxicating liquor, to wit, 1 glass of beer then and there contained in —, and that he, the said defendant, then and there well knew the same to be such intoxicating liquor against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

Whereupon said Attorney of the United States, who prosecutes as aforesaid, for the United States prays the consideration of the court here in the premises, and that due process of law may be awarded against said defendant in this behalf to make his answer to said United States concerning the premises aforesaid.

Oliver D. Burden, United States Attorney.

[fol. 5] IN UNITED STATES DISTRICT COURT

COMPLAINT OR AFFIDAVIT UPON WHICH SEARCH WARRANT WAS ISSUED

UNITED STATES OF AMERICA,
Northern District of New York, ss:

Be it remembered that on this date before me, W. M. Arthur, a United States Commissioner for the Northern District of New York, came Chas. G. Dodd, a United States Internal Revenue Agent, detailed to act as Prohibition Enforcement Agent, who, being by me duly sworn, deposes and says:

That he believes the laws of the United States, viz.: The National Prohibition Act, are being violated by reason of the facts, to wit: that intoxicating liquors, containing more than one-half of one per cent of alcohol by volume, are being unlawfully possessed for the purpose of sale and distribution, at the premises known as a 2½-story frame hotel on northerly side of main highway leading from Pine Woods to Madison. Said hotel in Bouckville, N. Y., owned and operated by John Doe in said Village of Bouckville, N. Y., and District as aforesaid.

That the grounds of this application and the sources of deponent's said belief are the following facts and circum-

stances: That on June 29, 1926, deponent personally purchased of a person in charge at said premises, a drink of intoxicating liquor, to wit: beer, containing more than one-
[fol. 6] half of one per cent. of alcohol by volume, for the sum of $.10. That deponent tested the said beer which he took with him and same was found to contain 4.85% of alcohol by volume.

That from the foregoing, deponent has reason to believe and does believe that intoxicating liquors are being possessed on said premises for the purpose of unlawful sale and distribution contrary to the provisions of the National Prohibition Act and against the peace and dignity of the United States of America.

Charles G. Dodd.

Sworn to before me and subscribed in my presence this 6th day of July, 1926. W. M. Arthur, U. S. Commissioner as Aforesaid.

This cause coming on for hearing on the application for a search warrant, supported by the affidavit above set forth, the undersigned Commissioner thereupon being satisfied that there is probable cause to believe that the grounds set forth in the application and affidavit do exist, and that the law is being violated as charged, does hereby so find.

W. M. Arthur, U. S. Commissioner as Aforesaid.

[fol. 7] IN UNITED STATES DISTRICT COURT

William M. Arthur, United States Commissioner, 103 W. Dominick Street, Rome, N. Y.

UNITED STATES

vs.

JOHN DOE

Viol. Nat. Pro. Act, Hotel Bouckville, N. Y., June 29, 1926

CERTIFICATE OF U. S. COMMISSIONER

Dec. 20th, 1926.

I hereby certify that the complaint or affidavit, upon which the search warrant was issued in the above entitled matter, was made before me on the 6th day of July, 1926.

That the search warrant was issued on or about said 6th day of July, 1926, but was not executed within the ten days prescribed by statute, and was returned to me by Albert Vandiver, Prohibition Agent in Charge of the Syracuse office requesting that same be reissued or redated, and my docket book shows that same was reissued on the 27th day of July, 1926, and mailed back to said Vandiver.

W. M. Arthur, U. S. Commissioner.

IN UNITED STATES CIRCUIT COURT OF APPEALS

[fol. 8] Notice that bill of exceptions will be presented, omitted; printed side page 2 ante.

[fol. 9] IN UNITED STATES DISTRICT COURT

[Title omitted]

BILL OF EXCEPTIONS

Be it remembered that the preliminary motions of the defendant in the above entitled cause came on for hearing and decision on the 21st day of December, 1926, being one of the days of the December term of the said Court, before the Honorable Frank Cooper, Judge of said Court.

Oliver D. Burden, Esq., Appeared as Attorney for the Government.

Floyd S. Spangle, Esq., of counsel.

I. K. Baxter, Esq., Appeared as Attorney for the Defendant.

[fol. 10] The defendant moved on verified motion papers to restrain the use of evidence unlawfully obtained by Federal Prohibition Agent B. G. Silvernail and others in the purported execution of a search warrant issued by William M. Arthur, United States Commissioner at Rome, N. Y., on the 6th day of July, 1926; and alleged that said Federal Agents under color of authority of said warrant, on the 2nd day of August, 1926, searched defendant's hotel on Main Street at Bouckville, N. Y., and claimed to have

seized therefrom "I pint gin, 3½ bbls. beer," on the following grounds:

First

That the search warrant was dated and issued on the 6th day of July, 1926. That it was not "executed and returned to the Judge or Commissioner who issued it within 10 days after its date," and that "after the expiration of this time the warrant, unless executed, is void."

The defendant offered in support of this point the certificate of the United States Commissioner who issued the warrant showing that the complaint or affidavit upon which the search warrant was issued was made before him on the 6th day of July, 1926. That the search warrant was issued on "said 6th day of July, 1926, but was not executed within the 10 days prescribed by statute, and was returned to me by Albert Vandiver, Prohibition Agent-in-charge of the Syracuse office, requesting that same be reissued or redated, and my Docket book shows that same was reissued on the 27th day of July, 1926, and mailed back to said Vandiver." [fol. 11] The Court overruled and denied the motion on this first ground and stated:

"I hold that within a reasonable time after the date of the offence alleged, after the date of the probable cause is brought to the attention of the commissioner, he may issue a search warrant and if ten days has elapsed without its execution, he may change the date and thereby extend that search warrant or he may issue a new one. He has power to do both. It matters not which way he does it." To which ruling of the Court the defendant duly excepted.

Second

That said search warrant was illegal and invalid, having been issued without probable cause, solely upon the affidavit of Charles G. Dodd which merely alleged that he had reason to believe that there was intoxicating liquor unlawfully possessed at defendant's said hotel and that the grounds of the application and source of his belief are "that on the 29th day of June he purchased of a person in charge at said premises a drink of intoxicating liquor, to wit: beer containing more than half of one per cent of alcohol by volume for the sum of ten cents" and that he "tested said beer which he took with him and same was

found to contain 4.85 per cent of alcohol." Defendant urged that there were no facts stated in said affidavit to constitute probable cause, that the only facts alleged in [fol. 12] said affidavit were that he purchased a drink of beer for the sum of ten cents to which are added the opinions and conclusions of the affiant that it was intoxicating liquor, that it contained more than one-half of one per cent of alcohol by volume; that he tested said beer and that it was found to contain 4.85 per cent of alcohol by volume. That such alleged opinions and conclusions of the affiant were at most mere opinion evidence or attempted expert testimony which the affiant was not shown qualified to give, there being not even a single fact alleged in said affidavit which tended to show any experience, knowledge or other qualification of the affiant as an expert. That the alleged conclusion in said affidavit that intoxicating liquor was possessed or had been sold at defendant's premises was controverted and denied and that under the language of statute it therefore became the duty of the Judge or Commissioner to call witnesses and take evidence as to the controverted grounds upon which the search warrant purported to have been issued.

"The Court: You are making the contention now that because the statute speaks of controverting a search warrant that you may have a preliminary investigation under the title of controversy of the search warrant to determine whether or not it actually was alcoholic liquid which the affiant purchased?

Mr. Baxter: That is my understanding and the language of the statute."

[fol. 13] The defendant further urged that even if the affidavit upon which the search warrant purports to have been issued had stated sufficient facts to constitute probable cause for issuing a search warrant that the existence of such facts on the 29th day of June, 1926, did not constitute probable cause for issuing a search warrant to search defendant's premises on the 2nd day of August, 1926, because the time was too remote.

Third

That the search and seizure by said Federal officers at defendant's premises on the 2nd day of August, 1926,

under color of authority of said search warrant were illegal, invalid and mere wanton trespass on the part of said Federal officers; because instead of following the mandate and direction of the search warrant, they seized and wantonly destroyed three and one-half barrels of lawful cereal beverage, which was properly marked and labelled cereal beverage, containing less than one-half of one per cent of alcohol by volume. That upon committing such wanton trespass, and unlawful and wilful destruction of property, said Federal officers became trespassers ab initio.

"The Court (interrupting): Does that render invalid evidence of the seizure and the offering in evidence of the things seized under that search warrant?

Mr. Baxter: Yes, sir; it makes every act of these supposed officers, when they once desert their official attitude and become trespassers and wanton trespassers and de-
[fol. 14] stroyers of property, it makes every act that they do on that occasion a trespass.

The Court: That is something you hope to write into the laws of this country, which has not yet been written in.

Mr. Baxter: No sir; there are decisions of the United States Court which holds that directly.

The Court: You have reference to some decisions, and I doubt if any are in the United States Court, about trespassers ab initio. If you have a decision of the Supreme Court which holds that a federal officer executing a search warrant, who, outside of the scope of his authority, while legally and lawfully executing the mandate of the search warrant, not going beyond its provisions in any way so far as the seizure of the property described in the mandate is concerned, but unofficially, outside of the scope of his duties, destroys some other property, if you can show any authority that the destruction of that property not described in the search warrant, wanton destruction, if you please, which would render the officer liable in his personal right, not only civilly for the damages which he caused, but possibly criminally, that that invalidates a lawful search warrant, lawfully issued and lawfully executed, I would like to see that case.

Mr. Baxter: I do not claim it invalidates the search warrant. I claim it invalidates the attempted execution. That is the decision I have in mind.

The Court: What do you mean by "invalidates the attempted execution?"

Mr. Baxter: It shows that the officer was not there law- [fol. 15] fully executing the search warrant as he purported to be when he first came in and served a copy; it shows he was there as a trespasser, not with the thought in his mind of carrying out the order or direction of the court and confining himself to the authority therefor, but he high-handedly takes the matter in his own hands; and if that had been intoxicating liquor, and I suppose they will claim in their opinion it was, there is not any authority, no right in or duty on them, no power in any place outside of this court, to destroy the property. This property was wantonly destroyed. We are not able to show what it was now because these agents ruthlessly went in there and usurped the province of the court and jury and acting like——

The Court (interrupting): If you are not able to show what was in there, is the government either?

Mr. Baxter: But it is sufficient that we show the unlawful acts, to show the trespass of these federal men.

The Court then asked to be shown the Federal Court decision which defendant claimed supported his contention on this point; and defendant's counsel handed to the Court a copy of the decision and opinion in the case of U. S. vs. Cooper, 295 Fed. 709.

The Court then denied the preliminary motions of the defendant, to which rulings of the Court the defendant duly excepted.

A jury was then drawn and the case proceeded to trial. [fol. 16] While the jurors were being called the following took place at the bench and out of hearing of the jurors:

"The Court: After hearing the statements of the counsel at the bench and out of the hearing of the jury, I understand there is a stipulation to be placed on the record, as follows:

Mr. Baxter: This stipulation is made and entered into on behalf of the defendant subject to the defendant's contention that such seizures were made by the federal prohibition agents under color of authority of an illegal, invalid and void search warrant; that said search warrant was void be-

cause it was not served within ten days of the date of its issue; that the same was illegal and invalid because it was issued without probable cause; and that the officers by wantonly destroying the property of the defendant at the time of the purported search, thereby became trespassers, and made all of their acts on that ground alone illegal trespasses; and that, therefore, the evidence obtained by means of such search and seizure cannot lawfully be used against the defendant or his property in an action or proceeding at law; that timely motions setting forth these contentions of law of the defendant were made, together with a motion asking for the return of the property alleged to have been unlawfully seized, and for an order to restrain the use of evidence obtained by means of said illegal and unwarranted search which the defendant claims was made by fed- [fol. 17] eral officers in violation of his constitutional rights, to be secure against unreasonable searches and seizures, to not be deprived of his liberty or property without due process of law, and to not be compelled to be a witness against himself, as guaranteed by the Fourth and Fifth Amendments to the Constitution of the United States.

The Court: It is agreed between the counsel for the parties that the stipulation of facts is to be read to the jury and that the reservation of counsel for the defendant will not be read to the jury, but are to be made a part of the record of the trial.

"That on or about the sixth day of July, 1926, William Arthur, United States Commissioner, at Rome, New York, issued a search warrant based upon an affidavit introduced in evidence in this case, of C. G. Dodd, in which Dodd swore that he made a purchase of beer of the defendant; that on the twenty-seventh day of July, 1926, the said search warrant not having been executed in the interim and ten days from the date of the search warrant having expired, the search warrant was taken by the prohibition agents to whom it was directed back to the commissioner and by him, or by someone in his office under his direction and control, the date of the search warrant was changed from July sixth to July twenty-seventh, 1926, and thus reissued; that acting under the color of such search warrant, Prohibition Agents Henry E. March, Bernard J. Dwyer and B. G. Silvernail went to the premises described in the search warrant,

namely, the Bouckville Hotel, of which the defendant is the [fol. 18] proprietor, at Bouckville, New York, in the Northern District of New York, and there, the defendant being present, searched the premises and found one pint of gin, a pint of beer in the bar room of the said premises, and also found in the cellar of said premises under said bar room three and a half barrels of liquid, one of the barrels of which liquid was on tap and connected with faucets in the bar room by means of a pipe which permitted the liquid to be drawn through the faucets under the bar in the bar room; that the said three and a half barrels of liquid were destroyed by the agents while on the premises; that while the defendant admits that such are the facts, the defendant contends that all evidence obtained by the said agents under color of the said search warrant is incompetent, not admissible in evidence and that the government should be excluded by order of the court from giving in evidence any information as to what was found upon the execution of the said search warrant based upon all the reasons set forth in the motion made by the defendant preliminary to the trial in this case; and upon the further ground that the search warrant was wholly invalid and illegal, not having been executed within ten days from its date and having been changed after its issuance and after the expiration of the said ten days of its original date, when all the life and vitality of the said search warrant had ceased, and when the paper was so changed it was invalidated and made of no value whatever."

All of the above took place at the bench and out of the [fol. 19] hearing of the jurors.

The jury having disagreed on the charge of said sale, the evidence presented by both sides there- is omitted from the record.

The stipulation as to the facts concerning the execution of the search warrant and the seizures made thereunder, as dictated by the Trial Court and as above appearing, bearing on the charge of possession, was then read to the jury by the court stenographer.

The prosecution then rested.

Both sides then summed up the case before the jury.

The Court then charged the jury as follows:

"The COURT: GENTLEMEN OF THE JURY: The charges against this defendant which you will consider are two. One is that on the second day of August, 1926, he unlawfully possessed intoxicating liquor, namely, gin. The second is that on June 29th, 1926, he unlawfully sold intoxicating beer, that is beer having an alcoholic content more than permitted by law. You understand, of course, that the fact a man is charged with crime is no evidence of his guilt. Many an innocent man has been charged with crime, some even have been convicted. A charge is not evidence of any kind of the commission of any crime. There must be some formality to take a man from his home or place of business and bring him into court. It is but just and proper that [fol. 20] there be some definite and specific charge made known to a man who is brought into court for trial, so he may know in advance what he is charged with and be prepared to meet it. It is for such purpose that charges are made formally, definitely and specifically, but they prove nothing about the guilt of the person or persons so charged. On the contrary, the presumption is that the person so charged is innocent until he is shown to be guilty by evidence which convinces the jury beyond reasonable doubt. So, the government must establish by evidence in this case which convinces you beyond a reasonable doubt, that the defendant is guilty of one or both of the offences charged against him. Returning, first, to the charge of possession on the second day of August, 1926. It is stipulated in this case, and by "stipulated" is meant "agreed," that is, the defendant admits, that on that date, at his Hotel in Bouckville, in this District, behind the bar, he had gin. He makes no question of unlawful possession. The government claims there has been no explanation of its possession. So, I take it, you will not need to spend much time in determining whether or not the defendant is guilty of the crime of unlawful possession. The other charge is that on the second day of June, 1926, he unlawfully sold intoxicating liquor, namely, beer, so called "good" beer, meaning thereby beer with presumably a pre-prohibition alcoholic content, beer such as there was before the days of prohibition. Though thee*r* is no direct evidence in that respect. [fol. 21] I think you may take it as common knowledge that when beer is spoken of as "good" beer, sometimes, at least, it means that kind of beer. The government has produced

its agent, one Dodd, who, as you will recall from the evidence, has been in the Philippine Constabulary and a Civil Engineer, and so forth, before he became a prohibition officer, and he says that at the time in question he stopped at this place, that he went in ostensibly to inquire about the roads, and that while there he asked for and was given a glass of beer; he says he remarked to the man about it, that it was pretty good beer and wondered where he could get such beer; that the man who sold it to him is the defendant, that he recognizes him as the man. He further says that he drank some of the beer and then, according to his testimony, he retained some in his mouth, went outside and to his car and rejected it from his mouth into a bottle and put a tablet or half a tablet, of bichloride of mercury in it; that later he returned to the premises, according to his testimony, to get another look at the man who sold him the beer so he would be able to identify him thereafter. He says this defendant is the man. At the time he made the purchase of the beer, he says he asked this man where he could get such good beer and the defendant said he got it in Utica; that he also asked if he did not have to go after it and he, the defendant, said "No," it was delivered to him. Of course, [fol. 22] this is all according to the testimony of the government's witness. There was a discussion about the price. The government's witness said the defendant told him it cost twenty-eight dollars a barrel. The government's witness also says that he has had abundant experience in drinking near beer, which is beer with an alcoholic content less than one-half of one per cent, practically no alcoholic content, and in drinking beer with an alcoholic content in excess thereof. He says that when there is an alcoholic content of two and a half or more per cent he can tell it is beer with alcohol in it, but below that he is unable to tell, but that he does know the difference between the beer that does have an alcoholic content of more than two and a half per cent and beer with none or less than a half of one per cent. He says he can tell it by the taste; that he has tasted it for a good many years, I have forgotten how many, you will recall the evidence, and he says this was beer with an alcoholic content of two and a half per cent or more. He also says that he made a test of that portion of the glass of beer which he retained in his mouth and, as soon as he got outside, ejected it into the bottle, placing bichloride of

mercury in it, kept it in the bottle and took it to Syracuse; that at Syracuse he made the test called the ebul-*oi*meter test. The witness Dodd not being a chemist, the government chemist has been sworn and he says this test is one of the accepted approved methods of determining the alcoholic content of such liquids or beverages and that it is a reason-[fol. 23] ably accurate method of determining the alcoholic content. The man Dodd tells you how he used it, and the government chemist also told you the method of using it, which, as I recall, corresponds. Just what the witness Dodd testified about the boiling points of the water and the mixture, as to which was the higher, I do not recall. At any rate, the general method is to take the difference in temperature, that is, the boiling point, of water without alcohol, which requires a higher boiling point than water with alcohol and then that of water with alcohol and, after finding the difference between the two temperatures, or boiling points, they take a table and by the use of that table, possibly something like an interest table or a table of logarithms, determine the percentage of alcohol present. Dodd says that is the method he followed and the chemist says it is an accepted and approved method. Dodd says, by that method, he found that the liquid in question contained 4.85 per cent of alcohol. The defendant says, in substance, this is all wrong; he never had any good beer, or intoxicating beer, beer with more than one-half of one per cent, in his premises at any time; that the only beer he had was near beer, which he purchased of the West End Brewing Company in Utica. This trial is in Utica. The West End Brewing Company is located here, according to the testimony, and the defendant might have presented corroboratory testimony of that, possibly, if it were true. He says also that he never saw this man Dodd, that this man [fol. 24] was never in his place; that he never had any intoxicating beer and he never had any intoxicating beverage of any kind.

Either Dodd or the defendant is mistaken; both cannot be telling the truth; and the determination of the question of whether or not there was a sale of intoxicating liquor by the defendant on that occasion largely depends upon who is telling the truth. In determining who is telling the truth you have the right, very naturally and as men of common sense, to take into consideration the interest which these

conflicting witnesses have in the outcome of the case. If you can see that either witness has a great, not to say vital interest in the outcome of the case, you may ask yourselves whether or not the testimony of such a witness is as much to be relied upon as that of one whose interest is not so great; in other words, is the testimony of either witness likely to be and is it given to serve his own interest. If you find there is a witness in this case on this point who is greatly interested in the outcome of the case, you may take that into consideration in determining whether you will believe him and how much credibility you will attach to his testimony, and whether there is reason to believe that his testimony would cast a reasonable doubt upon the testimony of any other witness not thus situated, if there be any other witness not thus situated.

The rule of reasonable doubt will be expounded to you in a moment, but it does not necessarily give rise to reasonable doubt because one man contradicts another man. [fol. 25] You can readily see that, if that were necessarily so, no person charged with crime, who saw fit to deny that he committed the crime, could ever be convicted, because reasonable doubt would necessarily arise. All that I am saying is that reasonable doubt does not necessarily arise because one man contradicts another. I am not saying that it may not arise or that is does not arise in this case.

Another thing—there is a stipulation in this case to the effect that such and such things were destroyed, certain liquids; it does not say anything about the character of the liquids, what they were. The stipulation says certain liquids were on the premises on August second, the date that the gin was found. There is no evidence as to what those liquids were or why they were destroyed or anything else, and I charge you that they do not enter into this case and you are to give no consideration whatever in your decision of this case as to the guilt or innocence of the defendant on either or both of the charges, to them; you are to attach no consideration, give any weight to, you are not to consider at all the question of these three and a half barrels of liquid which were destroyed. They are not in the case and there is no question involving them now before you.

In a criminal case the burden of proof is upon the prosecution and it must prove every material fact and establish

[fol. 26] the guilt of the defendant to your satisfaction beyond a reasonable doubt. The degree of satisfaction and certainty required is not absolute conviction or certainty, but tne evidence must produce that effect on the minds of the individual jurors so that after its consideration, that is, after considering the evidence, each juror can, in view of his oath, have no reasonable doubt of the guilt of the accused.

By reasonable doubt I mean a doubt arising out of the evidence, not an imaginary doubt, a fanciful conjecture or a strained inference, but such a doubt as a reasonable man would act upon or decline to act upon when his own concerns are involved, a doubt for which a good reason can be given, which reason must be based on the evidence or on the want of evidence.

When such a doubt exists the accused is entitled to its benefit and should be acquitted, but where the evidence is satisfactory to an impartial mind that the crime was committed, that the defendant committed it as charged, when the mind comes naturally and reasonably to such a conclusion from a fair consideration of the evidence, then there can be no reasonable doubt and the prisoner should be convicted.

So you will take all the facts and circumstances in this case into consideration. You have heard the evidence in this case describing what kind of premises this was, a [fol. 27] hotel in Bouckville, New York. You have heard about this bar room, the bar and faucets and things of that sort and you have seen the defendant; you have seen the witnesses for the government; you have heard their testimony. You will decide whether this defendant sold intoxicating beer on the twenty-ninth of June or whether he did not; whether he possessed gin on the second of August unlawfully, or whether he did not. And in deciding these questions all you have to do is to keep uppermost in your minds the thought that you are deciding questions of fact, did he or did he not, and let no other considerations of any kind enter into it. The world will go on, whatever be the result of this tral, but you should not allow your prejudices, if any you have, in any way to enter into your decision at all. Whatever you may think or I may think or anybody here may think about this particular law, or whether or not there should be any modifica-

tion of this law, has nothing whatever to do with this case and it has no place with you in the jury room. You must decide the facts and let those who are charged with the responsibility for the enactment and repeal of laws assume the responsibility. While the law is here, and it is here, it is your duty and my duty to take this law just like any other law and not in any other way, without feeling of any kind whatever. It is the law and it must be accepted as in biblical times the Word of God was accepted, under what they then believed was the medium of the expression of the Word of God. It is the law. That is all [fol. 28] there is to it. Did the defendant do this, or did he not. That is all there is for you to say. If you do that your consciences will be clear and you will not be subject to any criticism. You have done your full duty.

So, take this case, gentlemen and decide these two questions merely and solely—did he? or, Did he not? and let nothing else enter into the consideration."

The jury retired at 11:45 A. M.

The jury returned at 4:27 P. M. and returned a verdict finding the defendant guilty as charged in the possession count, and disagreed on the sale count. Counsel for defense then moved to set aside the verdict finding the defendant guilty on the charge of possession on the grounds that there was no legal evidence and not sufficient evidence to warrant the jury in finding a verdict of guilty on that count. Also on all the preliminary motions of defendant and objections and exceptions on the constitutional grounds as recited in the stipulation, but the court overruled the motion and the defendant duly excepted.

The Court then returned judgment of conviction on first count, possession and sentenced defendant to pay a fine of $500 or stand committed to the Chenango County jail until the fine is paid; to which judgment of the Court the defendant, by his counsel, duly excepted.

This is to certify that the foregong bill of exceptions ten- [fol. 29] dered by the defendant is correct in every particular and is hereby settled and allowed and made a part of the record in this cause.

Done in open court this 7th day of September, 1927.

Frank Cooper, United States District Judge.

IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR WRIT OF ERROR, SUPERSEDEAS, AND BAIL

To the Honorable Frank Cooper, Judge of the District Court of the United States for the Northern District of New York:

And now comes Cesaro Sgro, the Defendant in the above entitled cause, and feeling himself aggrieved by the judg- [fol. 30] ment of the District Court of the United States, for the Northern District of New York, entered on the 22nd day of December, 1926, hereby petitions for an order allowing him, said Defendant, to prosecute a Writ of Error from the United States Circuit Court of Appeals for the Second Circuit, to the District Court of Appeals for the Second Circuit, to the District Court of the United States, for the Northern District of New York; that said writ of error may be made a supersedeas, and that your petitioner be released on bail in an amount to be fixed by the Judge thereof, pending the final disposition of said Writ of Error. Assignment of Errors is filed with this petition.

Dated December 22nd, 1926.

Cesaro Sgro, by I. K. Baxter, His Attorney.

IN DISTRICT COURT OF THE UNITED STATES

[Title omitted]

[fol. 31] ASSIGNMENT OF ERRORS

And now, on this 22nd day of December, 1926, comes the defendant, Cesaro Sgro, by his attorney, I. K. Baxter, Esq., and says: That the judgment of conviction in the above case against him on the 22nd day of December, 1926, is erroneous and unjust to the defendant, because:

First

The Court erred *y*in denying the preliminary motion of the defendant to vacate the search warrant herein, because

said search warrant was issued without probable cause solely upon the affidavit of Charles G. Dodd, which alleged no facts and not sufficient facts to constitute probable cause for issuing a search warrant as required by law.

Second

The Court erred in denying the preliminary motion of the defendant to declare the search warrant herein null and void; because said search warrant had been dated and issued on the 6th day of July, 1926, and was not executed within 10 days of the date of its issue and was, therefore, void under the statutes of the United States in such case made and provided.

Third

The Court erred in denying the preliminary motion of the defendant to declare all the acts of the federal officers, [fol. 32] purporting to execute the search warrant herein, trespasses; because said officers at the time of the purported execution of said search warrant wilfully and maliciously and unlawfully destroyed property of the defendant and by such acts became wanton trespassers and were, therefore, trespassers ab initio.

Fourth

The Court erred in denying the motion of the defendant to restrain the use of evidence obtained by federal officers through the search and seizure under color of authority of the search warrant herein; because said search warrant was illegal and invalid, because said search warrant was void, and because the acts of said federal officers on the purported execution of said search warrant were trespassers ab initio; and because said search and seizure was, therefore, made without any warrant or authority in law by federal officers in violation of the defendant's constitutional rights to be secure against unreasonable searches and seizures, to not be deprived of his property without due process of law, and to not be compelled to give evidence against himself as guaranteed by the Fourth and Fifth Amendments to the Constitution of the United States.

Fifth

The Court erred in admitting over the objections and exceptions of the defendant at the time of trial evidence

obtained by means of a search and seizure of defendant's [fol. 33] property by federal officers on August 2nd, 1926; because said search and seizure was made under color of authority of an illegal, invalid and void search warrant, and was trespass ab initio by said federal officers; and was, therefore, made without any warrant or authority in law, in violation of defendant's constitutional rights, to be secure against unreasonable searches and seizures, to not be deprived of his property without due process of law, and to not be compelled to be a witness against himself, as guaranteed by the Fourth and Fifth Amendments to the Constitution of the United States.

Sixth

The Court erred in denying the motion of the defendant herein to set aside the verdict of the jury finding defendant guilty on the first count, possession, of the information herein, on the ground that there was not sufficient evidence and not any legal evidence to support such a verdict; because the only evidence presented on the trial on said count had been obtained through the illegal and unwarranted search and seizure of defendant's property, in violation of his constitutional rights, as aforesaid.

Seventh

The Judgment of the Court is contrary to law as shown in the foregoing Assignment of Errors.

Wherefore the defendant and plaintiff-in-error prays that the said judgment of the District Court of the United [fol. 34] States may be reversed and held for naught.

I. K. Baxter, Attorney for Petitioner, 66 Genesee Street, Utica, N. Y.

In United States District Court

[Title omitted]

Order Allowing Writ of Error and Admitting Defendant to Bail—Dec. 22, 1926

Let a Writ of Error issue from the United States Circuit Court of Appeals for the Second Circuit to the United [fol. 35] States District Court for the Northern District of

New York, as prayed for in the petition of the said Cesaro Sgro; and that a citation be issued to the Defendant in Error.

And it now appearing that a citation has been served in the cause, it is now ordered that the Writ of Error, allowed as above stated, operate as a Supersedeas, and the defendant be admitted to bail, upon furnishing a bond in the penal sum of two thousand dollars ($2,000.0-), conditioned according to law to be approved by me.

Frank Cooper, Judge.

[fol. 36] Citation, in usual form, showing service on Floyd S. Spangle, omitted in printing.

[fol. 37] In United States District Court

[Title omitted]

Order Allowing Extension of Time—Jan. 19, 1927

This cause coming on further to be heard before this Court on the petition of the above named defendant, Cesaro Sgro, for a Writ of Error to review the conviction of said Defendant herein upon Count I, possession, of the Information herein; and it appearing to this Court that the said Defendant has been unable to procure the stenographic record herein so as to specifically set forth the Assignment of Errors; but that said Defendant has filed Assignment of [fol. 38] Errors herein for the consideration of this Court on said application; and a Writ of Error having been allowed and filed herein; and due deliberation having been had thereon;

Now, on Motion of I. K. Baxter, Esq., Attorney for said Defendant, Cesaro Sgro, It Is Hereby

Ordered, That the December Term of this Court be extended 250 days from the date hereof for the purpose of signing and settling the Bill of Exceptions to be signed and settled and filed therein, and for all other purposes; and It Is Further

Ordered, That the United States of America, Complained herein, be granted an extension of time to be and appear at the United States Circuit Court of Appeals for the Second Circuit at the City of New York, N. Y., of 250 days from the date hereof.

Frank Cooper, United States District Judge.

IN UNITED STATES DISTRICT COURT

STIPULATION DISPENSING WITH COMPARISON BY THE CLERK

It is hereby stipulated between the parties that the foregoing record is the record of writ of error herein, and further comparison by the Clerk be dispensed with.

Dated September 27th, 1927.

Irving K. Baxter, Attorney for Plaintiff in Error.
Oliver D. Burden, Attorney for Defendant in Error and United States Attorney.

[fol. 39] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 40] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

[Title omitted]

Before Manton, A. N. Hand, and Chase, Circuit Judges

Appeal from the District Court of the United States for the Northern District of New York

I. K. Baxter, Esq., Attorney for Plaintiff in Error.
Oliver D. Burden, Esq., United States Attorney, for Defendant in Error.

OPINION—Filed Jan. 18, 1932

Per CURIAM:

Judgment affirmed.

[fols. 41 & 42] In United States Circuit Court of Appeals

Judgment—Jan. 25, 1932

Appeal from the District Court of the United States for the Northern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Northern District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be, and it hereby is, affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fols. 43-52] Petition for rehearing, covering nine pages, omitted from this print. It was denied and nothing more by order of February 9, 1932.

[fol. 53] In United States Circuit Court of Appeals

[Title omitted]

Order Denying Petition for Rehearing—Feb. 9, 1932

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof it is

Ordered that said petition be and hereby is denied.

Wm. Parkin, Clerk.

[fol. 54] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 55] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 31, 1932

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, and the case is advanced and assigned for argument on Monday, October 10th next.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.